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IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 1168 of 1986

For Approval and Signature:

Hon'ble MISS JUSTICE R.M.DOSHIT

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

SHAH KIRITKUMAR RATILAL

Versus

DALWADI CHIKA RAMJI

Appearance:

MR SURESH M SHAH for the Petitioner

MR PR THAKKAR for the Respondent

CORAM : MISS JUSTICE R.M.DOSHIT

Date of decision: 17/10/2002

ORAL JUDGEMENT

This is a Revision Application preferred by the

respondent - plaintiff under Section 29(2) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (hereinafter referred to as 'the Rent Act') against the judgment and order dated 25th February, 1986 passed by the learned Assistant Judge, Surendranagar in Regular Civil Appeal No.120/1983.

The disputed premises is a residential building (hereinafter referred to as 'the suit house') situated at Limdi, District Surendranagar. The suit house was purchased by the defendant on 6th June, 1971. Since then, the defendant no.1 has been in occupation of the suit house. On 22nd December, 1972, the defendant sold the suit house to the plaintiff for a sum of Rs.3,000=00 under a registered sale deed (Ex.40). On the same day, the suit house was leased to the defendant for a monthly rent of Rs.30=00. The defendant executed a rent note (Ex.42). Exhibit-41 is the abstract of the accounts book maintained by the plaintiff evidencing payment of Rs.3,000=00 to the defendant and the other expenses incurred for the said sale transaction. On the same day i.e. on 22nd December, 1972, the plaintiff, under agreement for sale (Ex.43), agreed to sale the suit house to the defendant for a sum of Rs.3,000=00 provided the defendant paid the said sum of Rs.3,000=00 by the date stipulated therein. It appears that under the aforesaid transaction even after the sale of the suit house to the plaintiff the defendant continued to be in possession of the suit house as a lessee thereof. The defendant, however, did not pay the rent agreed to be paid by him. The plaintiff, on 13th February, 1981, gave a notice of demand (Ex.44), calling upon the defendant to pay a sum of Rs.2,820=00 being the amount of rent due for 94 months and terminating the tenancy of the defendant. The said notice was duly served upon the defendant. The defendant, however, neglected to pay the amount of rent demanded.

The plaintiff instituted Civil Suit No.79/1981 in the Court of Civil Judge (J.D.), Limdi for recovery of amount of arrears of rent and possession of the suit house.

The suit was contested by the defendant by filing written statement (Ex.16). The defendant denied that he was tenant of the plaintiff. The defendant claimed that the sale dated 22nd December, 1972 was made with a view to securing repayment of a sum of Rs.3,000=00, which the defendant had borrowed from the father of the plaintiff. The lease deed was executed to secure the payment of interest over the said sum of Rs.3,000=00. Thus, the

said documents were part and parcel of one single transaction i.e. that of mortgage. With a view to securing redemption of mortgage the plaintiff had agreed to resale of the suit house to the defendant on the defendant's paying the agreed sum within the agreed time. According to the defendant the lease deed was not intended to be the lease deed. By the said lease deed no relationship of landlord and tenant was created between the plaintiff and the defendant. The plaintiff, therefore, had no right to sue the defendant and claim recovery of possession of the suit house under the Rent Act.

The learned trial Judge, under the judgment and order dated 30th August, 1983, allowed the suit. The learned trial Judge held that the lease deed was enforceable. The learned trial Judge was pleased to hold that the defendant was a tenant in arrears. The case was governed by Section 12(3)(a) of the Rent Act. The learned Judge further held that even if the case were governed by Section 12(3)(b) of the Rent Act, the defendant had not paid the rent regularly pending the suit. He had, thus, incurred the liability of eviction. The learned Judge passed decree for possession of the suit house and also for a sum of Rs.1,100=00 being the amount of arrears of rent for three years preceding the date of the suit.

Feeling aggrieved, the defendant preferred Regular Civil Appeal No.120/1983 in the Court of District Judge, Surendranagar. The appeal was heard by the learned Assistant Judge, Surendranagar. The learned Assistant Judge, under the impugned judgment and order dated 25th February, 1986, held that the transaction in question was that of a mortgage and the lease deed was not enforceable under the Rent Act. The learned Assistant Judge accordingly allowed the appeal and dismissed the suit of the plaintiff. Feeling aggrieved, the plaintiff has preferred the present Revision Application.

As far as the facts are concerned, the same are undisputed. It is not disputed that the rent of the suit house was payable by the month; that there was no dispute as to the standard rent of the suit house; that the defendant was in arrears of rent for six months and more; that he neglected to pay the rent demanded under the suit notice (Ex.44). Hence, the defendant is liable to be evicted of the suit premises. However, the question is whether the lease deed (Ex.42) is enforceable or not. The learned Assistant Judge has examined the effect of

the three documents executed on 22nd December, 1972 (Ex.40, 42 and 43) and has come to the conclusion that the transaction was that of a mortgage. Even if the transaction were that of a mortgage, the question would still remain whether the lease deed (Ex.42) is enforceable or not. I believe that the learned Assistant Judge has erred in not examining the issue at all.

The learned advocate Mr.Shah has submitted that the matter at issue is not res integra. The question has been examined by this Court as well as by the Hon'ble Supreme Court. He has relied upon the judgments of this Court in the matters of HEIRS OF LATE JATASHANKER FULCHAND MEHTA V/S. HEIRS OF LATE MAVJI TRIKAM [10 G.L.R. 600]; and of SHAH BABULAL SOMALAL V/S. SHAH KANTILAL HARGOVANDAS [20 G.L.R. 36]. He has also relied upon the judgment of the Hon'ble Supreme Court in the matter of MATHURALAL V/S. KESHAR BAI AND ANR. [A.I.R. 1971 S.C. 310].

In the matter of Heirs of late Jatashanker Fulchand Mehta (supra), similar was the issue before the Division Bench of this Court. In that case the defendant had mortgaged the disputed property with the plaintiff for a sum of Rs.2,250=00 by registered mortgage deed and, by a contemporaneous document of a registered rent note of the same date possession was sought to be delivered to the defendant. The rent payable was arrived at on the basis of the interest at the rate of 61/2 annas per cent per annum. The Courts below relied upon the Bombay High Court's judgment in the matter of HIRALAL BHAGWANJI V/S. SHASTRI HEMSHANKAR UMIASHANKAR [A.I.R. 1958 BOMBAY 8] and held that the registered rent note did not create relationship of landlord and tenant as it was a mere device to secure interest. In appeal by the plaintiffs to this Court, the Division Bench cited the judgment of the High Court of Madhya Pradesh in the matter of MOTIDAS B.S.R.T.BOARD V/S. RAMJATAN [A.I.R. 1963 M.P. 265] with approval, which reads as under :

"where a deed of possessory mortgage also provided for a lease back to the mortgagor on a monthly rent corresponding to the monthly interest on the mortgage debt, and a rent note was executed giving effect to the lease, effect must be given to each deed according to its terms and the Court could not by reading the two together spell out a transaction totally different in character. Their being component parts of the same transaction did not mean that the two deeds were inconsistent with each other.

> Nor were the circumstances that rent was liable to be appropriated towards interest, interest like rent was payable every month, inconsistent with the transaction being a lease. Therefore, in a suit for eviction by the mortgagee based on the rent note which was executed as a sequel to the mortgage deed, it was not open to the mortgagor to plead that he was not in fact a tenant."

Excluding the cases where the lease might be unenforceable on account of some invalidating circumstances or that the transaction is hit by any law, the Division Bench further held that "...In all other cases, however, there would be no room for application of any of the provisos to Section 92 and the bar would remain absolute and it would not be open tot he Court to construe these two documents except on their own terms, on any such assumption of the supposed intention of the parties, which consideration is wholly ruled out by Section 92 for the purpose of varying the terms of the two documents. Possessory mortgage can not be turned into a simple mortgage without possession and the lease also can not be made ineffective. Therefore, we can not look to the substance by ignoring the true legal position which had been created by the transaction legally entered between the parties, who had deliberately arrived at said two agreements with intention to create legal relation and had duly acted upon the same." Similar is the view expressed by the Division Bench in the matter of Shah Babulal Somalal (supra) in a similar set of facts.

In the matter of Mathuralal (supra) also was a case of contemporaneous mortgage of the suit property and lease back to the mortgagor. The mortgagee obtained a preliminary decree for sale. However, no application for final decree of sale was made within the period of limitation but, a suit for eviction came to be filed against the mortgagor alleging that the rent for the premises had remained unpaid. In an appeal arising from the decree for eviction passed in the said suit, it was argued before the Hon'ble Supreme Court that the rent note executed simultaneously with the mortgage was a mere device to secure payment of interest and did not record an independent transaction. Further it did not create any relationship of landlord and tenant. The learned Judges of the Hon'ble Supreme Court negatived the contention and held that "...If during the continuance of the security the mortgagee wants to sue the mortgagor on the basis of the rent note and take possession himself or to induct some other tenant thereby securing to himself

the amount which the mortgagor had covenanted to pay, there can be no legal objection to it ...there can be no objection to his suing for possession if the rent note entitles him to do so."

For the purpose of present Revision Application, I am not required to examine whether the three documents in question i.e. the sale deed (Ex.40), the lease deed (Ex.42) and the agreement for sale (Ex.43) though ostensibly a sale, constitute a mortgage and, that the lease deed (Ex.42) has been executed with a view to securing interest on the mortgage money. In view of the settled law referred to hereinabove, even if the transaction were that of a mortgage, the plaintiff would still be entitled to enforce the lease deed (Ex.42) and to claim the possession of the suit house and the amount of rent due under the said lease deed. Besides, it is undisputed that the defendant was in arrears of rent as alleged. The defendant did not pay the amount of rent due within one month from the date of the receipt of the suit notice (Ex.44). Hence, in my view, the learned Assistant Judge has erred in refusing to examine whether the plaintiff was entitled to decree for eviction or not. The learned Assistant Judge ought to have held that the plaintiff was entitled to enforce the lease deed (Ex.42) and to claim recovery of possession of the suit house.

Accordingly, the Revision Application is allowed with costs. The impugned judgment and order dated 25th February, 1986 passed by the learned Assistant Judge, Surendranagar in Regular Civil Appeal No.120/1983 is quashed and set aside. The judgment and decree dated 30th August, 1983 passed by the learned Civil Judge (J.D.), Limdi in Civil Suit No.79/1981 is restored. Rule is made absolute.

(Ms. R.M. Doshit, J.)

/sakkaf